Supreme Court, U.S.
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No. 91-129

IN THE SUPREME COURT OF THE UNITED STATES

MARGARET DORSEY,
Petitioner,

vs

THE CITY OF DETROIT, ROBERT BUTUCEL, KENNETH ROBINSON, BYRON GRABER, GWENDOLYN JOHNSON AND WILLIAM HART,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. CERTIORARI SHOULD NOT BE GRANTED BECAUSE THE REQUIREMENTS OF F.R. APP P. 3(c) ARE CLEARLY DEFINED AND WERE NOT SATISFIED.

II. CERTIORARI IS NOT NECESSARY TO DETERMINE WHETHER A 42 USC §1983 ACTION BROUGHT IN A STATE COURT CAN BE REMOVED TO THE FEDERAL COURT.

PARTIES TO PROCEEDINGS

Petitioner, Margaret Dorsey, is a resident of the City of Detroit. She was one of the Plaintiffs in the trial of this case and one of the appellants before the United States Court of Appeals for the Sixth Circuit. Robert Dorsey was the original and primary plaintiff in this lawsuit and appeal. The other original plaintiffs were the grandchildren of Margaret Dorsey.

Respondent, City of Detroit, is a municipality existing by virtue of the Constitution of the State of Michigan. It was a defendant to the action at trial and appellee before the United States Court of Appeals for the Sixth Circuit.

Respondents, Robert Butucel, Kenneth Robinson, Byron Graber, Gwendolyn Johnson and William Hart, were all members of the City of Detroit Police Department on November 22, 1981. Each respondent was a defendant at trial and an appellee in the matter before the United States Court of Appeals for the Sixth Circuit.

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RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

OPINIONS BELOW

On October 4, 1988, the United States Court of Appeals for the Sixth Circuit issued its opinion, affirming in part and reversing in part, the judgment of the District Court. The opinion was published, Dorsey v City of Detroit, et al. 858 F.2d 338 (1988).

On November 26, 1990, the United States Court of Appeals for the Sixth Circuit entered its order, dismissing the appeal for lack of jurisdiction.

On April 22, 1991, the United States Court of Appeals for the Sixth Circuit entered its order denying Petitioner's timely filed Motion for Rehearing, and Suggestion for Rehearing En Bac.

SUPREME COURT JURISDICTION

Petitioner seeks review of a portion of the opinion of the United States Court of Appeals for the Sixth Circuit of October 4, 1988.

Petitioner further seeks review of the order of the United States Court of Appeals which dismissed the petitioner's appeal dated November 26, 1990 and the order denying Petitioner's Motion for Rehearing dated April 22, 1991.

Petitioner invokes the certiorari jurisdiction conferred on the Court by 28 USC §1254(1).

STATUTES AND COURT RULE INVOLVED

42 USC §1983 provides:

Civil Action for Deprivation of Rights.

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

28 USC § 1441 (a-c) provides:

Actions Removable Generally

> (a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For

purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or in its discretion, may remand all matters in which State law predominates.

Federal Rules of Appellate Procedure 3(c) provides:

Content of the Notice of Appeal

The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken. Form 1 in the Appendix of Forms is a suggested form of a notice of appeal. An appeal shall not be dismissed for informality of form or title of the notice of appeal.

STATEMENT OF THE CASE

This case arises out of a traffic violation. During the early morning hours of November 22, 1981, Police Officers Robert Butucel and Kenneth Robinson were on a routine patrol when they saw a car being driven without the use of headlights and travelling the wrong way on a one way street. The officers activated their emergency equipment and approached the automobile. Instead of stopping, the driver sped away from the police

and lead them on a chase that covered several miles. The car cut across traffic, went the wrong way on one way streets, crashed into a parked car and came to rest in front of a house. The driver, later identified as Robert Dorsey, jumped out of the car, ran to the porch and began yelling for his mother, Margaret Dorsey.

The officers approached Mr. Dorsey and asked him to step off the porch. Mr. Dorsey refused and brandished a pipe he had taken from the car. The officers went onto the porch to arrest Mr. Dorsey. He resisted arrest and fought with the officers. During the struggle, all three men fell from the porch to the ground. While the men were struggling, Mrs. Dorsey opened the front door.

When she saw her son fighting with the police, she rushed to his defense, but was pushed away. She retreated to the porch, got a shovel and attacked the officers. The officers warned her to put away her shovel and when she refused, she was arrested.

The chase was broadcast to officers in the area. By the time the Dorseys were subdued, Sergeant Graber, Officer Johnson and her partner arrived at the scene.

Mrs. Dorsey asked Officer Johnson to go into the house to make sure that Mrs. Dorsey's grandchildren were not alarmed. Officer Johnson went into the house, comforted the children and made sure that an adult was available to care for the children. She then took a coat to Mrs. Dorsey.

Mr. Dorsey and his mother were conveyed to the precinct, where Mr. Dorsey continued to fight with the police. Eventually, the traffic matter and related misdemeanor citations were resolved. Mr. Dorsey, his mother and her grandchildren then filed a lawsuit claiming, among other things, that they were falsely arrested and that their constitutional rights were violated.

The lawsuit was originally filed in the Wayne County Circuit Court but removed to the federal court for trial. The claims of the grandchildren were dismissed by motion. The claims of Mr. Dorsey and his mother were rejected by the jury. Both

Mr. Dorsey and his mother then filed an appeal. The appeal of Mr. Dorsey was denied. Mrs. Dorsey was granted a new trial.

Although Mrs. Dorsey was the only remaining plaintiff, her attorney continued to use the original case caption. Most often, plaintiff's attorney used a case caption indicating that Robert Dorsey was the only plaintiff.

After a second trial, Mrs. Dorsey's claims were again rejected by a jury. An appeal was filed and again, Robert Dorsey was designated as the only plaintiff. On its own motion, the Court of Appeals invited the attorneys to show it had jurisdiction in view of *Torres* v *Oakland Scavenger Co*, 487 US 312 (1988) and *Minority Employees* v *Tennessee Department of Employment Security*, 901 E2d 1327 (6th Cir 1990) (en banc). The plaintiffs were not able to show that the Court of Appeals had jurisdiction and the appeal was rejected. A motion for rehearing was then filed and also rejected. Plaintiffs now seek a review by this Court.

CERTIORARI SHOULD NOT BE GRANTED

I. THE REQUIREMENTS OF F.R. APP P 3(C) ARE CLEARLY DEFINED AND WERE NOT SATISFIED.

F.R. App. P. (3)(c) requires that the party taking the appeal be specified. It is the notice of appeal which gives the Court of Appeals jurisdiction. *Donovan* v *ESSO Shipping Co*, 259 F2d 65 (CA NJ 1958) certiorari denied 79 S. Ct. 583, 359 U.S. 907, 3 L.Ed. 2d 572. Since Margaret Dorsey was not specified in any appeal, the court of appeals was without jurisdiction to consider her appeal.

As the petitioner herself indicates, an appeal was filed on December 5, 1989. The Court of Appeals, on its own motion and approximately one year after the appeal was filed, directed the parties to address the jurisdictional issue raised by petitioner's defective appeal. Petitioner had two trials and almost a year to correct any jurisdictional defect. She did nothing to amend the notice of appeal with the limits set by Rule 4 of the Federal Rules of Appellant Procedures. Because the rule requiring specificity is

mandatory, compliance is prerequisite to appellate court's jurisdiction. *Blitzstein* v *Ford Motor Co.*, 288 F.2d 738 (CA ALA, 1961). Petitioner presents no reason to ignore her oversight. The mandatory requirements of the rule cannot be waived. Furthermore, attorneys in multiparty cases are required to designate with specificity which parties are appealling and which are not *Samuel* v *University of Pittsburg*, 506 F.2d 355 (CA Pa, 1974).

In her brief, petitioner claims that, "the inclusion of the name of a would be appellant is not mandatory." That claim is contrary to the rules of appellant procedure and the state of the law. Failure to name a party on a notice of appeal results in a failure of that party to appeal. Use of the phrase "et al." does not provide notice of the appellant's identity and is not effective as a notice of appeai for anyone other than Robert Dorsey. *Morales* v *Pan American Life Insurance Co.*, 914 F.2d 83 (CA 5, 1990). *Tri Crown, Inc.*, v *American Federal Savings and Loan Association*, 908 F.3d 578 (CA 10, 1990).

Petitioner directs our attention to *Torres* v *Oakland Scavenger Co.*, 487 U.S. 312 101 L.Ed 285 (1988). That case is the law. Petitioner, however, ignores the fact that "et al." is not the functional equivalent of a notice of appeal. She also ignores the fact that she was never designated in the notice of appeal.

Rule 3(c) was imposed by the legislature and not the judicial process. The petitioner for a writ of certiorari must be denied.

II. CERTIORARI IS NOT NECESSARY TO DETERMINE WHETHER A 42 USC § 1983 ACTION BROUGHT IN A STATE COURT CAN BE REMOVED TO THE FEDERAL COURT

This action was originally filed in the federal court. Petitioner was unhappy with the pre-trial judge and dismissed the case. She then re-filed her case in the state court, but still raised a federal question. Defendants then removed the case to federal court. Petitioner obviously felt that her federal claims had some merit because she refused to dismiss her federal claims in order to return to the state court. Instead, petitioner appealed the denial of her motion for remand. That denial was affirmed on appeal. Now,

petitioner claims for the first time that she has the right to appeal the decision of the Court of Appeals. Her appeal is untimely.

It is interesting to note that all of the original plaintiffs sought to have this case returned to the state court. In this writ, however, petitioner tries to leave the impression that only her claims should have been returned to the state court. It is precisely this type of confusion that F. R. App. P.3(c) was designated to eliminate.

It is also interesting to note that none of the issues raised in this portion of petitioner's writ were preserved for appeal. Petitioner cannot raise them now.

Finally, petitioner ignores 28 USC § 1441, which specifically allows for the removal of civil rights claims.

Contrary to petitioner's assertion, this issue is not deserving of the Court's attention. Certiorari should not be granted.

Respectfully submitted,

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